SIVAKUMAR SOCKALINGAM & ANOR v. PEGUAM NEGARA, MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
WAN AHMAD FARID WAN SALLEH J
[JUDICIAL REVIEW NO: WA-25-264-07-2021]
13 MAY 2022

Abstract – *(i) In an application for judicial review against the Attorney General/Public Prosecutor's ('AG/PP') decision not to commence criminal prosecution, in proving the threshold locus standi, the applicants must satisfy the 'adversely affected' test within the meaning of O. 53 r. 2(4) of the Rules of Court 2012. For that purpose, the applicants could demonstrate to the court the application was a public interest litigation; and (ii) In challenging the prosecutorial power of the AG/PP under art. 145(3) of the Federal Constitution, the applicants must rebut the strong presumption of legality by adducing sufficient prima facie evidence.*

ADMINISTRATIVE LAW: *Judicial review – Leave – Application for – Judicial review against decision of Attorney General/Public Prosecutor's ('AG/PP') decision not to commence criminal prosecution – Whether applicants had locus standi – Whether applicants 'adversely affected' by decision – Whether applicants adduced compelling prima facie evidence to rebut presumption of legality – Whether mala fide proven on part of AG/PP*

As a result of statements that allegedly insulted the non-Muslims, especially Hindus, that were posted on social media accounts belonging to the Muslim preachers ('inflammatory statements'), 'Firdaus Wong' and 'Zamri Vinoth' ('preachers'), both preachers were lodged with numerous police reports. The police reports lodged, include those made by the applicants and one 'Shashi Kumar'. However, no criminal prosecution under ss. 298 and 298A of the Penal Code was commenced against the preachers. In fact, the two private prosecution proceedings under s. 133 of the Criminal Procedure Code initiated by Shashi Kumar in the Shah Alam Magistrate's Court ('Shah Alam proceedings') also met the same fate. At the Shah Alam proceedings, the Deputy Public Prosecutor informed the Magistrate that no criminal prosecution would be instituted against either preacher or the police reports made by Sashi Kumar were classified as 'No Further Action (NFA)' ('impugned decision'). Once the matter regarding the Shah Alam proceedings came into the knowledge of the applicants, the present application for leave of judicial review towards the impugned decision was filed ('application'). In objecting the application, two main grounds were raised by the Attorney General/Public Prosecutor ('AG/PP'), in that: (i) the applicants lacked the

locus standi to commence the application as they were not 'adversely affected' by the impugned decision within the meaning of O. 53 r. 2(4) of the Rules of Court 2012 ('ROC') as there was no direct causal link between the police reports lodged by them and the Shah Alam proceedings; and (ii) the impugned decision was not amenable to judicial review since under art. 145(3) of the Federal Constitution ('FC'), the AG/PP has the power exercisable at his discretion to institute, conduct or discontinue any criminal proceedings.

Held (dismissing application):

(1) The applicants were not busybodies. They had successfully shown the application was for the betterment of the society at large and that they fell within the factual spectrum covered by the words 'adversely affected' within the meaning of O. 53 r. 2(4) of the ROC in the context of public interest litigation which clothed them with the threshold *locus standi*. If indeed the preachers made the alleged inflammatory statements, the issue would surely go beyond the issue of injury of the applicants' private right and would come into the domain of public interest. The assertion that the alleged inflammatory statements could cause disharmony and disunity in multi-religious Malaysia should not be taken lightly. (paras 20-24 & 32)

(2) In exercising the prosecutorial power under art. 145(3) of the FC, the AG/PP is cloaked with the presumption of legality, meaning, the law presumes the AG/PP had acted legally in exercising the power. Onerous burden would lie on the applicant to overcome the strong presumption of legality with compelling *prima facie* evidence to rebut it. Exhibits of social media postings and police reports, without more, are not enough. The applicants must at least establish *mala fide* on the part of AG/PP, when he exercised the prosecutorial power. This the applicants had failed to prove. Therefore, the application was refused with no order as to costs. (paras 29, 30, 32 & 33)

Case(s) referred to:

Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***

Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 133(1)(d)

Federal Constitution, art. 145(3)

Penal Code, ss. 298, 298A

Rules of Court 2012, O. 53 rr. 2(4), 3

For the applicants - Gunaseelan S Thambinathan & Keshvinjeet Singh Sidhu; M/s Gunaseelan & Assocs
For the respondent - Ahmad Hanir Hambaly & Atiqah Zainal Abidin; FCs

Reported by Syamim Ariffin

JUDGMENT

Wan Ahmad Farid Wan Salleh J:

[1] This is an application for leave for judicial review.

[2] The application is supported by the affidavits in support of the first applicant ("AIS-3") and the second applicant ("AIS-4") in encls. 3 and 4, respectively.

[3] The factual matrix that leads to this application for judicial review can be summarised as follows. The applicants lodged separate police reports ("the applicants' police reports") against Firdaus Wong Wai Hung ("Firdaus Wong") and Muhammad Zamri Vinoth ("Zamri Vinoth") on 21 January 2018 and 26 April 2019, respectively, for allegedly insulting non-Muslims, especially Hindus, *via* Facebook postings and YouTube videos.

[4] The applicants alleged that despite numerous police reports lodged against Firdaus Wong and Zamri Vinoth, no prosecution was instituted against them under ss. 298 or 298A of the Penal Code ("PC").

[5] Under s. 298 of the PC, it is an offence for a person who, with deliberate intention, to wound the religious feelings of any other person. It is also an offence under s. 298A of the PC to cause disharmony, disunity, or feelings of enmity, hatred or ill-will on the grounds of religion.

[6] One Shashi Kumar a/l Shanmuga ("Shashi Kumar") initiated two private prosecution proceedings under s. 133 of the Criminal Procedure Code ("CPC") at the Shah Alam Magistrate's Court against Zamri Vinoth (BA-89-24-01-2021) and Firdaus Wong (BA-89-25-01-2021) respectively ("Shah Alam proceedings"). Section 133(1)(d) of the CPC provides that when a Magistrate takes cognisance of an offence under a complaint, then he shall examine the complainant upon oath and the substance of the examination of the complainant shall be reduced to writing.

[7] At the Shah Alam proceedings, the Deputy Public Prosecutor ("DPP") informed the learned Magistrate that no criminal prosecution would be instituted against either Zamri Vinoth or Firdaus Wong. In para. 23 of his AIS-3, the first applicant affirmed as follows:

> Saya telah mendapat tahu bahawa pada 26.4.2021, Timbalan Pendakwa Raya, yang hadir bagi pihak dan mewakili Responden telah memaklumkan Majistret bahawa pihak Responden telah memutuskan untuk tidak memulakan apa-apa prosiding bagi kesalahan-kesalahan jenayah terhadap kedua-dua Zamri Vinoth dan Firdaus Wong Wai Hung.

[8] The second applicant made the same assertion in para. 23 of his AIS-4:

> Alasan yang diberikan kepada Mahkamah Majistret bagi tidak memulakan prosiding jenayah tersebut adalah kerana pihak polis telah mengklasifikasikan laporan-laporan polis terhadap kedua-dua individu berkenaan sebagai "Tiada Tindakan Lanjut" atau "No Further Action" (NFA).

[9] Aggrieved at what they were informed as transpired at the Shah Alam proceedings, the applicants filed an application to seek leave for judicial review for the following reliefs:

(i) A declaration that the decision of the respondent *qua* Public Prosecutor recorded at the Shah Alam proceedings ("the impugned decision") that no criminal proceedings in respect of the criminal offences would be instituted against Zamri Vinoth and Firdaus Wong was null and void.

(ii) That leave be granted to the applicants under O. 53 r. 3 of the Rules of Court 2012 ("ROC") to apply for an order of *certiorari* to quash the impugned decision.

(iii) That leave be granted to the applicants to make an application for an order of *mandamus* to compel the respondent *qua* Public Prosecutor to institute criminal proceedings against Firdaus Wong and Zamri Vinoth.

[10] The Attorney General ("AG") objects to this application for leave.

The Attorney General's Objections

[11] The objections of the AG are premised on two main grounds:

(i) The applicants lack *locus standi* in that they are not adversely affected by the impugned decision within the meaning of O. 53 r. 2(4) of the ROC. In any event, the impugned decision is directly linked to Shashi Kumar's police reports No. Sri Muda 10757 and No. Sri Muda 1762/2018 on Zamri Vinoth and Firdaus Wong, respectively. The Shah Alam proceedings were based on these two reports and not the applicants' police reports.

(ii) The impugned decision is not amenable to judicial review. This is so because, under art. 145(3) of the Federal Constitution, the AG has the power exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence. The learned Senior Federal Counsel ("SFC") has highlighted a line of authorities and submitted that the court could not compel the AG to institute any criminal proceedings which he does not wish to institute. In *Long Samat & Ors v. PP* [1974] 1 LNS 80; [1974] 2 MLJ 152 FC, Suffian LP was of the view that:

> In our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue.

[12] For the aforesaid reasons, the learned SFC urged this court to refuse leave to commence the judicial review application.

The Applicants' Response

[13] Before me, learned counsel for the applicants submitted that the impugned decision did not affect just Shashi Kumar but all Malaysians, particularly the non-Muslims. According to learned counsel, it does not necessarily follow that those who had not lodged a police report would not be aggrieved if the relevant authorities took no action.

[14] Learned counsel then referred me to the judgment of the Federal Court in *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145 FC. The case carries the proposition that in order for an applicant to pass the "adversely affected test", the applicant had to show he had a real and genuine interest in the subject matter. Referring to the judgment, learned counsel submitted that this is at the leave stage. The required threshold is that on a quick perusal of the material available if the court thinks that subsequently, at the substantive stage, an arguable case may be disclosed, and the relief sought may be granted, leave should be granted.

[15] In the circumstances, learned counsel further submitted that the applicants, being non-Muslims, have every right to expect the AG to prosecute both Zamri Vinoth and Firdaus Wong.

[16] My attention was then drawn to the judgment of the Court of Appeal in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532; [2006] 3 MLJ 164 CA. The Court of Appeal reiterated the well-settled proposition that the single test of threshold *locus standi* for all the remedies that are available under the judicial review application is that the applicant should be 'adversely affected'. However, the Court of Appeal further held that the phrase calls for a flexible approach.

[17] On the argument that the impugned decision is not subject to judicial review, learned counsel referred me to the recent judgment of the Federal Court in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199; [2021] 5 MLJ 209 FC. The Federal Court *inter alia* held that the AG *qua* Public Prosecutor did not have absolute or unfettered discretion

under art. 145(3) of the Federal Constitution to institute, conduct or discontinue any proceeding for a criminal offence. Such discretion was amenable to judicial review in appropriate, rare, and exceptional cases.

[18] For the aforesaid reasons, learned counsel submitted that leave ought to be granted to the applicants to commence the judicial review application.

The Analysis

[19] Let me begin with the issue of *locus standi* and whether the applicants are adversely affected by the impugned decision within the meaning of O. 53 r. 2(4) of the ROC. Gopal Sri Ram JCA (later FCJ), in delivering the judgment of the Court of Appeal in *QSR Brands* while acknowledging the "flexible approach" in determining the threshold *locus standi*, observed that it is for the applicant to show that he falls within the factual spectrum that is covered by the words "adversely affected".

[20] I take cognisance that there is no direct causal link between the police reports lodged by the applicants and the Shah Alam proceedings and hence, the impugned decision. But this is not an ordinary case. The applicants took umbrage in the alleged inflammatory statements made against the non-Muslims by Zamri Vinoth and Firdaus Wong.

[21] If Zamri Vinoth and Firdaus Wong indeed made the alleged inflammatory statements, then the issue goes beyond the injury of the private right of the applicants. The assertion that the alleged statements could cause disharmony and disunity in multi-religious Malaysia should not be taken lightly. It has come into the domain of public interest.

[22] As can be seen in *QSR Brands*, the test for determining whether an application is a public interest litigation includes redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. In achieving that end, the directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual.

[23] With respect, despite not being directly involved in the Shah Alam proceedings that led to the impugned decision, the applicants are not busybodies. The applicants have demonstrated that this application for leave for judicial review is for the betterment of society at large.

[24] In the circumstances, I am of the respectful view that the applicants fall within the factual spectrum that is covered by the words "adversely affected" in the context of public interest litigation which clothes them with the threshold *locus standi*.

[25] The next issue for me to determine is whether the impugned decision is amenable to judicial review or otherwise.

[26] The Federal Court in *Sundra Rajoo* held that while the AG's powers are reviewable, the exercise of discretion under art. 145(3) of the FC, as a matter of policy, remains subject to a higher threshold of scrutiny. Tengku Maimun CJ, in delivering the judgment of the court, remarked that:

> In all challenges against the decisions of the AG/PP exercising his powers under art. 145(3) of the FC, the position is that his decisions are cloaked with the presumption of legality. The onerous burden lies on the challenging party to overcome the strong presumption of legality with compelling *prima facie* evidence of grounds to review the AG/PP's decision within the recognised reasons for judicial review.

[27] During the oral submissions, the learned SFC submitted that the applicants have failed to cross the presumption of legality in the exercise of prosecutorial discretion of the AG. The learned Chief Justice in *Sundra Rajoo* observed that the applicants must come to this court with compelling *prima facie* evidence to rebut the presumption of legality.

[28] The learned SFC further contended that FB postings and police reports are not compelling *prima facie* evidence capable of rebutting the presumption of legality.

[29] With respect, this line of argument has merits. The applicants must come with more than police reports and FB postings. Surely it is not the law that this court has the power to intervene in the constitutional discretion of the AG solely based on the police reports and postings on social media.

[30] In my considered opinion, the applicants must at least establish *mala fide* on the part of the AG. As the learned Chief Justice held in *Sundra Rajoo*, the AG is the guardian of public interest.

[31] So, in exercising his discretion under art. 145(3) of the Federal Constitution, the AG factors not only the law and legal principles but also matters relevant to public policy and national security. As indicated by the learned Chief Justice, this court, by constitutional design, does not have the same benefit.

Findings

[32] In the result, my findings are as follows:

(i) The applicants are not busybodies. They have shown to this court that they fall within the factual spectrum that is covered by the words "adversely affected" within the meaning of O. 53 r. 2(4) of the ROC.

(ii) In view of the serious allegations made that involve the future and betterment of the society at large, the applicants come within the ambit of "adversely affected" in the context of public interest litigation which clothes them with the threshold *locus standi*.

A (iii) The exercise of the prosecutorial power of the AG *qua* Public Prosecutor under art. 145(3) of the Federal Constitution is cloaked with the presumption of legality.

(iv) In short, the law presumes that the AG acts legally.

B (v) The onerous burden lies on the applicants to overcome the strong presumption of legality with compelling *prima facie* evidence of grounds to review the AG's decision within the recognised reasons for judicial review.

(vi) The applicants must come to court with more than police reports or C exhibits of social media postings to overcome the strong presumption of legality. Police reports and social media postings, without more, are not compelling and convincing evidence to rebut the presumption of legality.

(vii) One instance that the applicants can rebut the presumption is if they D can show the elements of *mala fide* on the part of the AG *qua* Public Prosecutor when he exercised that discretionary power under art. 145(3).

(viii) The applicants have failed to show any *mala fide* on the part of the AG E *qua* Public Prosecutor to justify to this court to review the exercise of his discretionary power.

(ix) Unlike an ordinary application for leave of judicial review, an application of this nature requires a higher threshold. The applicants have failed to cross this hurdle.

F **[33]** The application for leave is therefore refused with no order as to costs.

G

H

I